HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.990/2001

DB: Hon'ble L.C. Bhadoo,
Hon'ble Sunil Kumar Sinha, J, J

Appellants	1	Kailash Ram s/o Bhukhnath Ram, aged about 21 years
	2.	Bhukhnath Ram, s/o Sudhu Ram aged about 52 years
		Both are residents of village Kuding Mahua Toli, P.S.H. Jashpur, Distt. Jashpurnagar (C.G)
RESPONDENT		State of Chhattisgarh, through P.S.H. Officer, P.S.H., Jashpur, Distt. Jashpur Nagar (C.G)

Appeal under Section 374(2) of the Code of Criminal Procedure

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Appearance:

Shri J.K. Shahstri, counsel for the Appellants.

Smt. Anju Ahuja, counsel for the State.

ORAL JUDGMENT
(23.8.2007)

The following judgment of the Court was delivered by

L.C. Bhadoo, J,

Heard.

(1) This appeal is directed against the judgment of conviction and order of sentence dated 29.9.2001 passed by the II Addl. Sessions Judge, Fast Track Court, Jashpurnagar in Sessions trial No.62/2001 whereby the learned Addl. Sessions Judge convicted the accused appellants Kailash Ram & Bhukhnath Ram for commission of offence u/s 302 read with section 34 I.P.C., for committing murder of Jitiyaram. She also convicted both the accused for commission of the offence u/s 307 read with section 34 for attempting to cause death of Phoolchand and Etwa by inflicting the injuries and sentenced each of the accused to undergo imprisonment for life and to pay a fine of Rs.5000/-, in default of payment of fine to further undergo imprisonment for 5

(31)

months and to undergo life imprisonment and to pay a fine of Rs.3000/-, in default, to further undergo S.I. for 3 months respectively.

(2) The case of the prosecution, in brief, is that on 15th of August 2000, Phoolchand was going alongwith his father Jitiya and brother Etwa. Phoolchand & Etwa went to their house. Thereafter, they heard the cries of father. They reached near Tangara from where the cries were coming. They saw that the accused appellants Bhukhnath & Kailash alongwith co-accused Soharai & Kaleshwar, were attacking their father Jitiya. Seeing Phoolchand and Etwa, they left Jitiya and started assaulting Phoolchand with Axe and Etwa with lathi. Phoolchand took his father Jitiya and brother Etwa to the residence from where Jitiya left the house for giving information to the Sarpanch. While, Jitiya after giving information to the Sarpanch, was returning to his house, on the way, the accused Soharai, Indranath & Devnath attacked Jitiya with Axe and murdered him. The matter was reported to the Police station, City Kotwali, Jashpur by Phoolchand under Ex.P.21. The S.H.O. Police Station after registering the F.I.R., Ex.P.21 left for the scene of occurrence. He prepared inquest Ex.P.22 on the body of Jitiya. The accused Kailash, while in police custody, gave memorandum Ex.P.23 regarding the place where he kept the lathi, the weapon of offence, in pursuance of that he got recovered lathi under Ex.P.24. The blood stained clothes of Phoolchand were seized under Ex.P.27. The site Plan Ex.P.30 was prepared by the Investigating Officer. While in police custody Bhukhnath gave memorandum Ex.P.15, in pursuance of that, the Axe, weapon of offence, was seized under Ex.P.16 at the instance of the accused. The lathis and Axe were sent for examination to the Doctor who opined that the injuries found on the body of Phoolchand and Etwa can be caused by lathis and Axe in question. The body of Jitiya was sent for postmortem examination to Civil Hospital, Jashpur, under Ex.P.31 where Dr. Lalit Kumar Ekka, conducted the postmortem. He opined that cause of death was head injury and the death was homicidal in nature. He prepared the postmortem Ex.P.9. The injured Phoolchand was sent for examination of the injuries to Civil Hospital, Jashpur. His injuries

(32)

were examined by Dr.L.K. Ekka (P.W.1), he prepared the injury report Ex.P.1 & Ex. P-2 in respect of Phoolchand. He noticed the following injuries:

(i) A lacerated wound on left side of the neck in size of 4" x 2" x muscle deep;

(ii) A lacerated wound on the left side of deltoid muscle bone deep in size of 3" x 1 ½"

(iii) Multiple abrasions on the back

(iv) Two lacerated wounds in size of 2 x 1 cm.

The doctor advised X.Ray. The X-Ray plate is Ex.P.3A.

(3) Injured Etwa was also sent to the Government civil Hospital, Jashpur for examination of his injury where Dr.L.K.Ekka (P.W.l) examined his injuries. He prepared injury report Ex.P.4 & P.5, after examination, advised for X-Ray, Etwa was admitted in the hospital. His X-Plate is Ex.P.6 & Ex.P-7. X-Report is Ex.P.8 whereby it was opined that there was a compound fracture of left temporal head bone. After completion of the investigation, the charge sheet was filed against 6 accused persons among them accused Soharai was absconding, therefore, the charge sheet was filed in his absence and Kaleshwar being a minor was sent for trial to the Juvenile Board. The said charge sheet was filed in the court of C.J.M. Jashpur, who in turn committed the case to the court of Sessions Judge, Raigarh from where the Addl. Sessions Judge received the case on transfer for trial.

(4) The prosecution in order to establish the charge against the accused persons examined 9 witnesses. The statements of accused persons namely Kailash, Indranath, Deonath, Bukhnath Ram were recorded u/s 313 of Cr.P.C. They denied the material appearing against them in the prosecution evidence and pleaded innocence.

(5) The trial Court after conclusion of the trial acquitted the accused Indranath and Deonath whereas convicted the accused appellants and sentenced them, as aforementioned.

(6) We have heard Shri J.K.Shastri, counsel for the appellants and Smt. Anju Ahuja, Deputy Govt. Advocate for the State.

33

(7) Mr.Shastri argued that as far as the involvement of the accused appellants in commission of the murder of Jitiya is concerned, there is no evidence on record in the F.I.R. lodged by P.W.3 Phoolchand. He has not mentioned that he saw the accused Kailash, Indranath, Deonath whereas in the court evidence he has stated that he saw these 3 accused persons carrying the body of his father and they threw that body. Therefore, the accused appellants have been convicted without any evidence against them. As afar as the conviction of the accused appellant u/s 307 read with section 34 I.P.C. for attempting to murder Phoolchand & Etwa is concerned Mr. Shastri has not challenged their conviction. But argued that the sentence imposed upon them is life imprisonment u/s 307/34 I.P.C. and fine imposed upon them is Rs.3000/- which are excessive. He argued that looking to the facts and circumstances, each of the accused ought to have been sentenced to R.I. for 5 years each.

(8) On the other hand, learned State Counsel supports the judgment of the trial Court.

(9) As far as the involvement of the accused appellant in the commission of murder of Jitiya is concerned, in the first instance, only Phoolchand P.W.3 has been examined by the prosecution in order to establish this charge and who is none else than son of the deceased, therefore, as per the settled law, being a close relative, his evidence has to be scrutinized with great care and circumspection in order to ascertain the truthfulness of his version.

(10) In the F.I.R. lodged by this witness, he has narrated that on the fateful day i.e., 15.1.2000 at about 9 p.m. when he was standing out side the house, he heard the cries of his father from the side of Tangara near Tamarind tree. He went there and saw that his father Jitiya and brother Etwa were being beaten by accused appellants Bukhnath, Kailash alongwith co-accused Soharai, Kaleshwar. Bukhnath and Soharai were holding Axe while Kailash and Kaleshwar were holding lathi. Seeing him the accused Bukhnath left his father. He with the intention to cause death, attacked him with the Axe on his neck, left shoulder and

34

back. At that time, Kailash and Kaleshwar attacked his brother Etwa with lathi, as a result of which, he fell down, thereafter all the accused persons left them and they again started beating his father. In the meantime, he took his brother Etwa to his residence and there was injury on his forehead and calf region of the left leg. He was unconscious. He informed the incident to his wife Phoolmani and Kunti. His father did not return to the house. Today morning, he went to the house of the Kotwar and informed him about the incident, then the Kotwar informed him that dead body of his father is lying near the house of Kholiha. He had gone alongwith Sarpanch and saw the body. In the court evidence this witness has given totally a contrary version and even on account of this contradiction, he has also been declared hostile by the prosecution. In the court evidence he has stated that when he reached, accused Bhukhnath attacked him with an Axe on his neck, scapular region and back side, as a result of which, he sustained injuries. The accused persons attacked his brother Etwa with lathis. He after getting released his father from accused, he brought him to the house and he informed his father that he has been attacked with Axe. At about 11 in the night, his father left the house saying that he is going to inform the Sarpanch. He informed the mother Lariya and wife Phoolmati about the incident. When his father did not return, he sent his wife Phoolmati to trace the whereabouts of his father, when she did not return then he left the house in search of his father and wife. After certain distance, he saw that the accused persons were throwing the body of his father in the agricultural field where water was flowing and they ran away. At that time, he saw the accused Kailash, Indranath, Deonath, in fact they threw the body of his father. He became frightened, therefore, he did not go to that site. He saw the accused Indranath and Deonath going to the residence of Soharai. He also silently followed them, then he heard the accused Indranath, Deonath saying to Soharai that they have done their job, therefore, they be paid for that, on which Soharai replied to Indranath and Deonath that he had no money but they can take one of the Oxen, therefore, at about 1 a.m., in the night the accused Soharai had given one Ox to them. This witness has turned hostile because he has given

contradictory evidence to F.I.R. The above evidence to the extent of seeing the accused persons carrying the body of his father is missing in the F.I.R. as also hearing the conversation of the co-accused Deonath & Indranath while saying to Soharai that they have done the job, therefore, they be paid and Soharai gave one ox to them saying that he has no money.

(11) In the first instance, as per his court evidence, his father Jitiya came to the house after receiving injuries in the first attack and he left the house at about 11 p.m. in the night saying that he is going to inform the Sarpanch and in the night he did not return. Therefore, there is nothing on record to establish that in the first instance any fatal injuries were caused by the accused appellants and those injuries were responsible for his death. In fact, dead body of Jitiya was found on next day morning that means homicidal injuries were inflicted to him after he left the house in the night. For these homicidal injuries there is no evidence on record that who inflicted those injuries. He left the house leaving Phoolchand and Etwa at his house, therefore, there is no cogent, reasonable and legally admissible evidence on record to establish that accused appellants inflicted homicidal injuries to the deceased Jitiya. The evidence of Phoolchand regarding seeing the accused Kailash, Deonath and Indranath carrying the dead body of Jitiya in the night does not inspire confidence as that evidence is totally contrary to the First Information Report Ex.P.21 lodged by this witness, therefore, the conviction of the accused appellants Kailash and Bhukhnath for commission of the murder of Jitiya cannot be sustained and the same is not based on any legal clinching evidence.

(12) As far as the conviction of the accused appellant Kailash and Bhukhnath u/s 307 read with section 34 for attempting to cause the death of Phoolchand and Etwa is concerned, in the first information report as well as the court evidence Phoolchand has categorically stated that when after hearing cries of his father, he reached near Tangara. Accused Bukhenath seeing him attacked him with the Axe on his neck, shoulder and back. Dr.L.K.Ekka (P.W.1) has stated that on 16.8.2000 he examined the injuries of the Phoolchand and noticed certain injuries i.e, (i) lacerated

wound on the left side of the neck deep upto muscle in size of 4" x 2" (ii) Incised wound on the left parietal muscle deep upto bone in size of 3" x 1 ½" x 3" , (iii) multiple abrasions on the back (iv) two lacerated wounds in size of 2 x 1 cm. He advised the X Ray for the left shoulder and his injury report is Ex.P.1. Therefore, in view of the ocular evidence of injured as also the medical evidence of L.K.Ekka who has examined him, it is established beyond reasonable doubt that the accused Bhukhnath attacked him with a deadly weapon i.e., Axe, that too on the neck, the vital part of the body.

(13) As per the decision of the Apex Court reported in the matter of State of ***Madhya Pradesh –vs- Saleem alias Chamaru and another, 2005 AIR SCW*** 3511, in order to sustain conviction u/s 307 of I.P.C., there must be intention coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section.

(14) In the matter of ***Hari Kishan & State of Haryana –vs- Sukhbir Singh and others AIR 1988 S.C. 2127*** the Apex Court held that u/s 307 IPC, what the court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". U/s 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention.

(15) Applying above principle, if we see the present case, the accused Bhukhnath was holding Axe, deadly weapon, he attacked Phoolchand with that Axe on the vital part of the body,

as a result of which he sustained 3 lacerated wounds on the neck which has been established by the Doctor and Phoolchand has categorically stated that when he reached on the spot, the accused persons were attacking his father and brother, seeing him, the accused Bhukhnath rushed towards him and with an intention to cause the death, he attacked with the Axe on his neck, therefore, the attempt of the accused coupled with the nature of weapon used that he attacked Phoolchand with an intention to cause death. Therefore, the ingredients of the commission of the offence u/s 307 regarding injuries inflicted on the body of Phoolchand is satisfied.

(16) So far as accused Kailash is concerned, all the accused persons were attacking together to Jitiya, Etwa and Phoolchand. Therefore, all the accused were sharing common intention of such act for inflicting the injury to Phoolchand. Therefore, the accused persons have been rightly convicted u/s 307 read with section 34 of I.P.C.

(17) As far as the case of the prosecution for attempting to commit murder of Etwa is concerned, P.W.3 Phoolchand has again categorically stated that the accused persons attacked his brother Etwa with lathis. P.W.4 Etwa himself has also stated that accused Bhukhnath, Kaleshwar, Kailash attacked him with lathi on the neck, hand and back as a result of which he became unconscious and his brother took him to the residence. Dr.L.K.Ekka (P.W.1) who examined the injuries of the Etwa has stated that there was swelling on the left parietal region. He advised for X-Ray. His report is Ex.P.4. The admission card is Ex.P.5. Two X-Rays were taken on the head of Etwa which are Ex.P.6 & P-7. On examination of the X-Ray plate Ex.P.7 it was found that there was a fracture of the temporal bone and his report is Ex.P.8. On the same principle, it has been mentioned above in the case of Phoolchand, the accused persons attacked him with lathis on his head as a result of which, his temporal bone was fractured and the manner in which the accused persons attacked and chosen the place of body where the attack was made, establishes the intention of the accused appellants. Therefore the intention coupled with the nature of injuries,

weapon used and place of the body chosen establishes that the accused persons made attack on the Etwa also with an intention to cause death. Therefore the accused appellants have rightly been convicted for inflicting the injuries on the body of Etwa, for commission of the offence u/s 307 r/w section 34 I.P.C. Therefore, the finding of the trial Court convicting the accused appellants under section 307 read with section 34 I.P.C. for attacking Phoolchand & Etwa does not suffer from any illegality or infirmity.

(18) As far as the sentence is concerned, the accused appellants have been awarded life imprisonment u/s 307 I.P.C. It is true that the sentence is excessive looking to the nature of crime. However the manner in which the offence was committed, attempt to murder of Phoolchand & Etwa was made, even though the murder of Jitiya was not established, but he lost his life in the same incident, therefore looking to the totality of the circumstances, we are of the considered opinion that if each of the accused appellant is sentenced to undergo R.I. for 10 years that will meet the ends of justice.

(19) In the result, the appeal of the appellants partly succeeds. Their conviction and sentence imposed upon them u/s 302 read with section 34 I.P.C. are set aside and they are acquitted of the charge. But their conviction u/s 307 read with section 34 is maintained. However, the sentence is reduced to 10 years R.I., on each accused. It is stated that accused Bhukhenath is on bail. He is directed to surrender before the trial court to serve out the sentence and his bail bonds are cancelled. For the period already undergone during investigation, trial and after conviction, the accused appellants shall be entitled for set-off against the sentence imposed upon them.

Sd/-
L.C. BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

Rao